Supreme Court, U.S.
FILED

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No. 08-1331 APR 22 2009

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IN THE

Supreme Court of the United States

MARK HYNES,

Petitioner,

v.

SONIDO, INC.,

Respondent.

On Petition For a Writ of Certiorari
To The State Of New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ANATTA LEVINSKY*
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QUESTIONS PRESENTED FOR REVIEW

1. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, and "right to a jury trial" of all traditional common law issues, referenced in U.S.CONST. amend. VII, and which should be seen as guaranteed by U.S.CONST. amend IX, U.S.CONST. amend. X, and U.S.CONST. amend. XIV § 1, when it dismissed Petitioner's appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, in which said Court used its power to determined issues of fact, acting as a fact finder, on an appeal of a summary judgment – violating of both statutorily prescribed procedure and precedent requiring the protection of the right to jury trial in such cases?

2. Did the State of New York Court of Appeals violate Petitioner's right to "right to a jury trial," referenced in U.S.CONST. amend. VII, and which should be seen as guaranteed by U.S.CONST. amend IX, U.S.CONST. amend. X, and U.S.CONST. amend. XIV § 1, and "due process of law," guaranteed by U.S.CONST. amend. XIV § 1 (particularly as to how said right relates to a New York State Constitutional right guaranteeing a trial by jury in a civil case), when it dismissed Petitioner's appeal of a Supreme Court of the State of New York, New York County grant of summary judgment in which the Judicial Hearing Officer explicitly stated on the record that he would determine issues of fact, acting as the fact finder?

3. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, when it dismissed Petitioner's appeal of the Supreme Court of the State

of New York, New York County's grant of summary judgment where said judgment was reached on an issue that was presented for the first time in the moving party's reply papers, and where the Motion Court did not permit Petitioner the statutorily prescribed notice period to reply, and denied Petitioner meaningful reply?

4. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, and did said Court also err in upholding a violation of such rights, when it dismissed Petitioner's appeal – stating that no substantial Federal Constitutional question was present on the case, when the above issues where presented?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELLOW

Pursuant to Rule 14.1(b), the following are all of the parties appearing before this Honorable Court:

Appearing as the Petitioner before this Honorable Court, and having appeared as the Plaintiff before the Supreme Court of the State of New York, New York County; as the Plaintiff-Appellant before the Supreme Court of the State of New York, Appellate Division, First Department; and as the Appellant before the State of New York Court of Appeals: Mark Hynes.

Appearing as the Respondent before this Honorable Court, and having appeared as the Defendant before the Supreme Court of the State of New York, New York County; as the Defendant-Respondent before the Supreme Court of the State of New York, Appellate Division, First Department; and as the Respondent before the State of New York Court of Appeals: Sonido, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a Corporation and is therefore not required to make a statement pursuant to Rule 29.6.

Petitioner alleges, however, upon information and belief, that Respondent, Sonido, Inc., is a corporation with no parent or affiliate, and that Respondent has three subsidiaries: Jerry Masucci, Inc.; Fania All Stars, Inc.; and, Key Productions, Inc.

Petitioner has no information as to whether any publicly held company owns 10% or more of Respondent's stock.

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OPINIONS BELLOW

The order of the Supreme Court of the State of New York, New York County (Appendix ("App.") 4-31) is unreported. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department (App. 2-3) is reported at 50 A.D.3d 314, 855 N.Y.S.2d 83, 2008 N.Y. Slip Op. 03060 (1st Dep't 2008). The decision of the Supreme Court of the State of New York, Appellate Division, First Department (App. 32), denying reargument and leave to appeal to the Court of Appeals of the State of New York is reported at 2008 N.Y. Slip Op. 77720(U) (App. Div. 1st Dept. 2008). The opinion of the State of New York Court of Appeals (App. 1) is reported at 11 N.Y.3d 827, 897 N.E.2d 1079, 868 N.Y.S.2d 595, 2008 N.Y. Slip Op. 87455 (2008). The decision of the State of New York Court of Appeals, denying reargument (App. 33) is reported at 2009 N.Y. Slip Op. 61492 (2009).

BASIS FOR JURISDICTION

The order of the Supreme Court of the State of New York, New York County granting summary judgment was entered on February 5, 2007 (App. 4-31). The Supreme Court of the State of New York, Appellate Division, First Department unanimously affirmed the aforementioned order and judgment of the Supreme Court on April 3, 2008 (App. 2-3). The Supreme Court of the State, Appellate Division, First Department denied Petitioner's motion for reargument and for leave to appeal to the Court of Appeals on June 15, 2008 (App. 32). On October 28, 2008, the State of New York Court of Appeals entered an order dismissing Petitioner's appeal and denying Petitioner's motion for leave to appeal (App.

1). The New York State Court of Appeals denied Petitioner's motion for reargument on January 22, 2009 (App. 33).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

APPLICABLE PROVISIONS OF LAW

U.S.CONST. pmbl.; U.S.CONST. amend. VII; U.S.CONST. amend. IX; U.S.CONST. amend. X; U.S.CONST. amend. XIV § 1; and 28 U.S.C. § 1257(a) are reprinted at App. 34-35.

STATEMENT OF THE CASE

(A) Statement of the facts.

In 1997, Sonido, Inc. ("Sonido") and Mark Hynes ("Hynes") executed a contract – an assignment of rights[1] – granting Mark Hynes a ten percent (10%) interest in all Internet sales of Sonido's catalogue.[2] The contract was printed in bold type, consisted of one sentence, and read in its entirety, "IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN SONIDO, INC. AND MARK T. HYNES, THAT SONIDO, INC., WILL PAY MARK T. HYNES, TEN PERCENT '10 (%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET, OF MUSIC, VIDEOS, ART, WORDS AND ADVERTISEMENT."[3] The contract was written by Jerry Masucci ("Masucci"), the company's owner,[4] who had been referred to Hynes (a Navy trained specialist in

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[1] App. 114.

[2] Record ("R.") 261-262, 286 & 307.

[3] App. 43.

[4] R. 240.

computers, system administration, and data base administration, who had also created, and handled chief management of, systems for a Florida police department, Corporate Micros, Lehman Brothers, and FIBA Nordic Securities) by Microsoft Corporation.[5]

It is undisputed on the record that when the contract was executed, the sale of music over the Internet was in an embryonic stage of development with relatively little commercial value, and that it was uncertain if, and how, Internet sales could bring a profit.[6] Hynes alleges that it was because of such financial risks that Sonido gave him the executed assignment – particularly, for the development of an Internet project with the multiple sophisticated aims needed to make Internet commerce of music viable at a time when it was not – not merely the development of a company website.[7] Aside from the purpose of creating an entire Internet network and database for Sonido,[8] another key purpose behind the contractual assignment was the development of a program for a company-wide, comprehensive secure billing system that would interface with the aforementioned Internet network, and with all of the company's music (which was to be encrypted and encoded),[9] as Masucci believed that the company was losing money through fraudulent bookkeeping, lost royalties, and other related problems.[10] Masucci wanted a program that was "fully redundant;" a program that would track everything that went on in his company, and in which entries could not be deleted, as Masucci also

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[5] R. 196-197.
[6] R. 286.
[7] R. 74, 200-206, 231 & 286.
[8] R. 37 (App. 38-42).
[9] R. 224.
[10] R. 200-204.

believed that he was losing money to inter-company theft.[11] The program was also meant to calculate royalties for all of Sonido's artists, authors, publishers, and producers.[12] It was also to function in producing invoices, and tracking *all* of the manufacturing and sale contracts of Sonido.[13] In short, the program was to bring the management of everything in Sonido to Masucci's fingertips.[14]

Hynes invested his own funds in servers and software, worked for hundreds of hours developing the Internet project, and encoded the music from thousands of compact discs from every label of the company's catalog.[15] Hynes was never paid for his services other than with the contract that is the subject of the present litigation.[16]

In November of 1997, the Argentinean magazine, Presario TV and Cable, published an article quoting Masucci as stating that all his company's material would be distributed via the Internet.[17] Shortly thereafter, on December 21, 1997, Masucci died unexpectedly while in Argentina.[18] Hynes has alleged that Masucci was murdered.[19]

After Masucci's death, Sonido attempted to terminate its contract with Hynes through the use of an instrument (a release), which Hynes alleged to be a forgery.[20] Sonido also repeatedly thwarted Hynes'

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[11] R. 203-204.
[12] R. 202.
[13] R. 202.
[14] R. 202.
[15] R. 36 (App. 38-42), 165-166, 182, 194-95, 211-212, 224, 239 & 260.
[16] R. 93, 165-166 & 260.
[17] R. 36 (App. 38-42).
[18] R. 308.
[19] App. 172-173.
[20] R. 9, 207-208 & 227-231.

efforts to honor the contract and to have it honored – attempting to repudiate the contract.[21] Sonido refers to these events collectively as a "discontinuance of [Hynes'] services."[22] In line with the above, Sonido has subsequently claimed never to have pursued the development of any Internet business, and never to have sold any music over the Internet – even stating that it has refused to contemplate doing so.[23] Hynes has asserted, however, that Sonido has indeed been receiving payment from Internet sales of licensed material; sales that correspond to expectation damages in an amount of roughly four million dollars ($4,000,000) per year.[24]

(B) Proceedings in the Supreme Court of the State of New York, New York County.

Hynes brought the present action in September of 2000, alleging breach of contract.[25] In February of 2001, Sonido moved to dismiss Hynes' Complaint based on the aforementioned alleged release that Hynes claimed to be a forgery.[26] It should be noted, as is required by SUP.CT.R. 14(1)(g)(i), that it was in his opposition papers to said motion that Petitioner first raised the issue of his right to a trial by jury, as Petitioner requested that the matter be submitted to a jury for trial, specifically stating that he had a property right that should not be taken without trial[27] In his opposition papers, Petitioner also requested that the Court "set up a discovery

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[21] R. 9, 91-93, 207-208, 227-231 & 286.
[22] R. 308.
[23] R. 309.
[24] R. 60-63, 71-72 & 286-293. Compare R. 248.
[25] Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.
[26] R. 9.
[27] R. 93.

schedule."[28] The Motion Court, however, did not grant Petitioner's requests, failing to set a date for trial or to schedule discovery.[29] (It should be noted, as required by SUP.CT.R. 14.1(g)(i), that in New York practice, if an issue is brought before a court on motion, and not specifically ruled on, the relief is deemed denied, and thus reviewable on appeal.)[30]

Instead of ruling on Petitioner's request for a jury trial and for scheduled discovery,[31] the Supreme Court of the State of New York, New York County directed the parties to obtain a date on a Referee's calendar so that the Referee could determine the genuineness of the release.[32] The Referee determined that the document was not an original, as sworn by Sonido's witnesses, but that it was instead a photocopy and inadmissible.[33]

In December of 2006, Sonido made a motion for summary judgment, asserting as its ground for the motion that Hynes had suffered no damages, and that he subsequently lacked an essential element

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[28] R. 95-96.

[29] R. 9-10. An appeal from a final order that disposes of the entire case (and is thus the equivalent of a final judgment) may be held to bring up for review prior non-final orders. See *Hurd v. Lis*, 126 A.D.2d 163,166, 513 N.Y.S.2d 278, 280 (3d Dep't 1987), discussed in Siegel, N.Y.S. LAW DIGEST, No. 333, p. 3 (Sept. 1987), which so held.

[30] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004). "Compliance and pretrial conferences are fixed by the Justice either (i) in a discovery scheduling order issued at a preliminary conference or compliance conference or (ii) in a decision on a motion." http://www.nycourts.gov/supctmanh/conferences.htm.

[31] R. 95.

[32] R. 9.

[33] R. 282-285.

required for his cause of action.[34] (Sonido asserted that Hynes had not incurred any damages because Sonido had never allegedly made, or attempted to make, any sales over the Internet.)[35] Hynes, however, submitted opposition to the Motion, including documentary and affidavit evidence that Sonido's music was indeed being sold over the Internet.[36] In accordance with the requirements of SUP.CT.R. 14(1)(g)(i), it should be noted that as Petitioner presented evidence contradicting Respondent's assertions that no triable issue of fact existed,[37] Petitioner also, by argument on the motion, raised the issue that a triable issue of fact did indeed exist, and, by extension, the issue of his right to trial (as mentioned above, in New York practice, issues are preserved on a motion if implied in the arguments presented on the motion papers).[38]

In its reply to Hynes' opposition, Sonido introduced for the first time ever the defense that the contract in question only applied to sales made directly over a particular website – a website that it coincidentally never developed, as it had unilaterally attempted to terminate its agreement with Hynes.[39] (Of particular note, Sonido had not made this defense previously in the original motion papers, and had

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[34] R. 10; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.

[35] R. 300, 307, 309 & 325-326; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.

[36] R. 286-292; Br. Plaintiff-Appellant at 34; App. 12.

[37] R. 286-293. It should also be noted that in New York practice the Complaint, if verified, is constantly before the court, and is deemed evidence in support of a plaintiff's case on a motion for summary judgment. *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959). See also R. 213.

[38] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[39] Compare R. 305-328 and R. 294-299. See also 302-304.

even failed to interpose the defense in its belated Answer – which was filed roughly seven years after the Complaint[40] along with the motion for summary judgment.)[41] As a party opposing a motion in New York practice is not permitted a sur-reply, Hynes was limited to the above submission of papers.[42] Nonetheless, and as mentioned above, in Hynes' opposition papers evidence was present – and specifically argued – that contradicted Sonido's contention as to the meaning of the contract (said evidence was submitted in documentary form, as well as affidavit evidence).[43] As required by SUP.CT.R. 14.1(g)(i), it should be noted, in regard to the above, that in New York practice[44] there is no requirement to continue making an argument for it to be preserved, once made, or to present further

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[40] *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959) (holding that summary judgment may not be granted whenever the *pleadings* raise clear, well-defined and genuine issues; nor may it be granted whenever there is doubt as to the existence of a triable issue, or even when the issue is arguable.); *Dannasch v. Bifulco*, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 361-362 (1st Dep't 1992) (holding that treating motion to dismiss as motion for summary judgment was improper, and that allegations of *complaint* adequately stated cause of action for piercing corporate veil).

[41] Compare R. 305-328 and R. 294-299. See also R. 288; Petitioner's Comments Concerning Subject Matter Jurisdiction at 16.

[42] The practice of filing a sur-reply was repudiated in *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562, 582 N.Y.S.2d 712, 713-714 (1st Dep't 1992); see also *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 626, 630 N.Y.S.2d 1003, 1004-1005 (1st Dep't 1995), which has been applied to bar consideration of such submissions. See e.g. *Pinkow v. Herfield*, 264 A.D.2d 356, 358, 695 N.Y.S.2d 20, 22 (1st Dep't 1999).

[43] R. 286-293; Plaintiff-Appellant's Br. at 7-34; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 3.

[44] *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005).

objections once the argument has been presented to the court on motion.[45] As mentioned earlier, the Motion Court's failure to specifically rule on a portion of a motion is deemed a denial of the part of the motion raising the issue by implication in its argument, and thus is reviewable on appeal of the order or judgment on the motion.[46]

The Petitioner had thus raised the issue that a triable issue of fact existed in his motion papers – by virtue of his argument and evidence presented – and was not required to tender any other method of preserving said issue[47] (a practice that differs from the procedure employed when there is an actual trial – as opposed to the practice on a motion – where an issue not preserved by overt objected to can be deemed waived).[48]

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[45] CPLR 4017. See also *Roma v. Blaustein*, 44 AD2d 576, 577-578, 353 NYS2d 44, 46-48 (2d Dep't 1974) (holding that while formal exceptions to rulings are no longer required, the trial court's conduct in refusing to permit the taking of an exception was *excessively antagonistic*, and that though a party must usually – during trial proceedings, as opposed to hearings on motion – make known the action which the party requests the court to take or, *if the party has not already indicated it*, his objection to the action of the court) (emphasis added). It should also be noted that, though this ruling is applied in a trial setting, its rule would also apply in the more forgiving motion setting – particularly on a motion for summary judgment.

[46] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[47] *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005).

[48] *Glow-Brite Elec. Service Corp. v. Frocol Restaurant Corp.*, 56 A.D.2d 909, 392 N.Y.S.2d 695, 696 (2d Dep't 1977).

After receiving the papers on the motion,[49] the Motion Court scheduled a hearing on the motion, which itself was improper;[50] yet, it was not until the hearing itself that the Motion Court informed the Parties that the scope of the hearing would be strictly limited to a factual determination regarding the one issue that was brought up for the first time in Sonido's reply papers (*i.e.* whether Hynes had any evidence of sales being made directly by Sonido over a particular website). [51]

It should also be noted here, as required by SUP.CT.R. 14.1(g)(i)), that, by determining an issue raised for the first time in the moving party's reply papers, the Motion Court did not follow the prescribed procedure for notice as to the issues to be decided on the motion; procedures which are established to protect a party's rights of notice, and to ensure a meaningful opportunity to respond.[52]

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[49] R. 10.

[50] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that here plaintiff's affidavits submitted in opposition to defendant's motion for summary judgment disclosed existence of issues of fact, court should then have denied the motion, and court's action in ordering a reference to aid court in determining the issues involved was improper, violating the party's Constitutional and fundamental rights).

[51] R. 10.

[52] See also *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992), where the Appellate Division, First Department states: "By making, for the first time in its reply, the contention that the medical record does not contain any indication of fetal distress, defendant has obviated the need for a response by plaintiff (CPLR 2214(b)); only when a defendant refutes 'by specific factual reference the allegations of malpractice made by plaintiff' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 326, 508 N.Y.S.2d 923, 501 N.E.2d 572) does the burden of going forward with the proof shift to the plaintiff "to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (68

The preservation of this issue on the face of the record, presumptively cataloging unfair surprise, is apparent on the face of the record created before the Motion Court, as the Motion Court readily stated that it had determined this material issue in favor of Respondent at the outset of the hearing.[53]

Furthermore, the Motion Court explicitly stated that the limited purpose of the hearing was to determine an issue of fact,[54] which itself became material only because the Motion Court had already determined another material issue of fact (concerning the meaning of the contract) prior to the hearing; stating that it had already reached a conclusion as to the meaning of the contract,[55] and had done so regardless of the conflicting factual assertions presented by both parties.[56] As stated previously, the Motion Court's conclusion was based on a contention raised for the first time in the Respondent's reply papers,[57] as nowhere on the record prior to its reply had Respondent made a distinction between Internet sales in general and those made over a particular website – despite Petitioner having presented the assertion to the Court, roughly seven years prior, that the subject matter of the contract concerned income resulting

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N.Y.2d at 326-327, 508 N.Y.S.2d 923, 501 N.E.2d 572, *supra*)." See also CPLR 3212(b), CPLR 2214(c); *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959); *Dannasch v. Bifulco*, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 361-362 (1st Dep't 1992); *Shanty Hollow Corp. v. Poladian*, 23 A.D.2d 132, 259 N.Y.S.2d 541 (3d Dep't 1965), aff'd 17 N.Y.2d 536, 267 N.Y.S.2d 912, 215 N.E.2d 158 (1966).

[53] R. 11, 18, 22 & 30.

[54] R. 10-11.

[55] R. 11.

[56] R. 10 & 286-294.

[57] R. 10-11, 30 & 296; Petitioner's Comments Concerning Subject Matter Jurisdiction at 15-16.

from *any* source by the Internet method (specifically referring to sales through licenses).[58]

In this way, the Motion Court reached its decision despite the fact that the factual issue of ambiguity concerning the meaning of the contract was raised before the hearing in Hynes' opposition papers (preserving the issue for appeal),[59] as well as in Sonido's reply papers (something that is readily apparent by merely comparing the parties' conflicting *factual* claims as to the meaning of the contract).[60] As required by SUP.CT.R. 14.1(g)(i), it should be noted that by ruling against the arguments and evidence presented by Petitioner on the motion,[61] the Motion Court preserved Petitioner's exceptions to the ruling,[62] and, as there is not any requirement to continue pressing an issue already placed before the court on motion,[63] the issue is deemed preserved for appeal.[64]

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[58] R. 37.

[59] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[60] R. 286-299.

[61] In New York practice the pleadings are required to be considered by a court on summary judgment. *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959). R. 36-37.

[62] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[63] *Id.* See also *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005) (although party did not specifically oppose building owner's motion to set aside verdict, it did assert its opposition by virtue of argument that its contract did not displace owner's duty to keep premises reasonably safe, and therefore issue was sufficiently preserved for appellate review).

[64] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 604 N.Y.S.2d 432 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 776 N.Y.S.2d 678 (4th Dep't 2004).

It should also be noted that throughout the hearing, the narrow scope set by the Motion Court was strictly enforced, and Hynes was repeatedly not allowed to pursue any inquiry, in his questioning of the testifying witnesses, that touched upon the material issue of whether the contract in question applied to all Internet sales, or whether it was limited only to those sales made directly over a particular website by Sonido.[65] Exception was taken – by argument – to the narrow scope set by the Motion Court, along with its interpretation of the contract that led to such a restricted scope,[66] and in such way, the issues were preserved for appeal – although such exceptions were unnecessary for preservation purposes, as the hearing was on motion. (The practice of preservation as it relates to motion practice differs to that of trial practice; for the issues raised on motion practice are deemed preserved if implicit in the arguments raised in the motion papers.)[67] It should also be noted that the Motion Court actively prevented – and interfered with – testimony that would favor Hynes;[68] particularly because it had already made a factual determination as to the meaning of the contract, and used that determination to support its ruling that all evidence contradicting its determination was beyond the narrow scope that it had set for the hearing.[69]

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[65] R. 11, 14-18, 24 & 30. See also R. 295-296. It should also be noted that the Motion Court stated that there was no question that Sonido music is sold over the Internet (a fact readily admitted during the hearing).

[66] R. 11-12, 15-19, 23-24, 30-31.

[67] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[68] R. 15 & 22.

[69] Id.

Furthermore, aside from refusing Petitioner the right to question witnesses regarding the material issue of the contract's meaning, the Motion Court construed any inference, raised by Petitioner, that could lean in his favor in the favor of Respondent,[70] to stymie the questioning – something that not only violates the established procedure for summary judgment,[71] but that also shows clear impartiality on the part of the Motion Court, chronicling another violation of basic due process.[72]

One example of the abovementioned bias that is particularly valuable in noting – as it both illustrates the tendency of the Motion Court to draw inferences against Petitioner, and to do so against Petitioner in a way that would pollute the record at Petitioner's expense – appears in the record at the conclusion of the hearing.[73] After Petitioner took issue with the Motion Court's interpretation of the contract,[74] and after the Court cut short Petitioner's argument as to the nature of a portion of his claim by substituting a cryptic and complicated statement of what it took to be Petitioner's claim[75] (one that could be taken to contain some of the assertions from Petitioner's Complaint, as it referred to sales of music made by a Sonido customer – something previously discussed at

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[70] R. 16, 18, 19, 23-24, 30 & 31. Particular attention should be given to R. 22 (App. 20), where the Motion Court interrupted questioning to itself state Respondent's position as if it were fact.

[71] *Tortorello v. Carlin*, 260 A.D.2d 201, 206, 688 N.Y.S.2d 64, 68 (1st Dep't 1999); *Pantote Big Alpha Foods, Inc. v. Schefman*, 121 A.D.2d 295, 296, 503 N.Y.S.2d 58, 59 (1st Dep't 1986); *Gerard v. Inglese*, 11 A.D.2d 381, 382, 206 N.Y.S.2d 879, 881 (2d Dep't 1960).

[72] 6 A.L.R. 4th 945.

[73] R. 31-32.

[74] R. 31.

[75] R. 32.

some length in the hearing[76] – but which obviously would not be understood by Petitioner as contradicting everything that he had stated previously and with great clarity in his Complaint,[77] or in the hearing), the Motion Court asked Petitioner's counsel if such described Petitioner's claim. When answered in the affirmative, as even that statement could conceivably fit within Petitioner's contractual right, the Court stated that it completely disagreed with Petitioner's position, and proceeded to grant Respondent's motion. This final example of bias, attempting to view Petitioner's argument in a light so unfavorable as to not even make sense against the backdrop of Petitioner's Complaint (which the Court was required by the law of the land in New York to hold as the definitive position of Petitioner's case on the motion),[78] clearly preserves the issue of impartiality on the record – an impartiality that itself stems from a factual determination that the Court made in violation of Petitioner's right to due process of law,[79] and a position which it was unwilling to waiver from even when exception was made.

Based chiefly on the Motion Court's factual determination of the aforementioned issues, it granted Sonido's motion for summary judgment, dismissing every cause of action alleged in Hynes' Complaint.[80]

A final related point should be made, as it relates to SUP.CT.R. 14.1(g)(i), and particularly to the

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[76] R. 17-19 & 28-30.

[77] R. 35-39.

[78] *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959).

[79] *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992).

[80] R. 7 & 305.

manner that the abovementioned issues were raised before the Supreme Court of the State of New York, New York County. Because of the Motion Court's aforementioned actions in: (1) ruling against the arguments and evidence brought up in Petitioner's opposition papers; (2) it's surprising limitation of the scope of the hearing after determining an issue of fact that was raised for the first time in the reply papers of the moving party – preventing retort; and (3) its thwarting of Petitioner's attempts to pursue a line of questioning supporting his claims, it is clear that the Motion Court's own action created prejudice and prevented such issues from being raised – constituting a circumstance in which the legal issues raised could not have been obviated or cured below, and were consequently reviewable upon appeal[81] – particularly in light of the fact that such issues are clearly apparent on the face of the record.[82]

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[81] *Rodriguez v. Cato*, 63 A.D.2d 922, 923, 406 N.Y.S.2d 100, 102 (1st Dep't 1978); *Graham by Graham v. Murphy*, 135 A.D.2d 326, 329, 525 N.Y.S.2d 414, 417 (3d Dep't 1988); *Breitung v. Canzano*, 238 A.D.2d 901, 901-902, 660 N.Y.S.2d 765, 766 (4th Dep't 1997) ("Because the error in the [unobjected to] jury charge was so fundamental that it precluded proper resolution of the central issue in the case, we reverse the judgment and grant a new trial." (citation omitted)); *Pivar v. Graduate School of Figurative Art of the New York Academy of Art*, 290 A.D.2d 212, 213, 735 N.Y.S.2d 522, 524 (1st Dep't 2002); *Telaro v. Telaro*, 25 N.Y.2d 433, 438-439, 306 N.Y.S.2d 920, 924, 255 N.E.2d 158, 160 (1969). See also *Rivera v. W. & R. Service Station, Inc.*, 34 A.D.2d 115, 117, 309 N.Y.S.2d 274, 276 (1st Dep't 1970) (new trial ordered in interest of justice where fundamental error involved).

[82] SUP.CT.R. 14.1(g)(i) ("[T]he places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised...").

(C) The Opinion of the Supreme Court of the State of New York, Appellate Division, First Department.

Hynes took an appeal from the Supreme Court of the State of New York, New York County to the Supreme Court of the State of New York, Appellate Division, First Department ("Appellate Division") on March 21, 2007. In his brief he alleged that: (1) his Constitutionally guaranteed right to due process of law had been violated when summary judgment was granted on issues raised for the first time in the Sonido's reply papers;[83] (2) that his Constitutionally guaranteed right to a trial by jury, as well as the guaranteed due process rights associated with said right, had been violated by the fact that the Motion Court determined triable issues of fact without letting those issues go before a jury;[84] and, (3) that the Motion Court had not followed proper procedure, and had thus violated his right to due process of law.[85]

The Appellate Division, however, affirmed the order and judgment of the Supreme Court of Motion Court on April 3, 2008.[86] In its decision, the Appellate Division specifically stated that it had considered all of the issues raised by Hynes on the appeal, which included the Constitutional issues referenced above, and found them "unavailing."[87] Of

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[83] R.37, R. 296; Br. Plaintiff-Appellant at 14 & 22-23; Reply Br. Plaintiff-Appellant at 1-7 (particularly note 15 at 4).

[84] R.10, R.15, R.22, and R.93; Br. Plaintiff-Appellant at i, 1, 7-11, 16 & 22-28; The Constitutional nature of the question was specifically noted in the Br. Plaintiff-Appellant at 10.

[85] Reply Br. Plaintiff-Appellant at 7, 14 & 19. See also Br. Plaintiff-Appellant at 11-14 & 22.

[86] Pet. Mot. Leave Appeal Ct. Appeals at 3.

[87] App. 2-3.

note, and as required by SUP.CT.R. 14.1(g)(i), the decision and opinion of the Appellate Division makes specific reference to the factual dispute regarding the meaning of the material term in question,[88] and also addresses the factual issue of ambiguity directly on the face of the opinion[89] – thereby affirming in its opinion the practice of a motion court acting as a fact finder on a motion for summary judgment.[90] Not only did the Appellate Division's decision specifically affirm the Supreme Court's determination of "the circumstances" of the case (despite the fact that the opinion clearly mentions that the appeal was from a motion for summary judgment – which makes it clear on the face of the opinion that no determination of the facts had yet been made by a jury),[91] it also used its unique power to review the facts of the case (where by law it places itself in the place of the trial court),[92] to make factual determinations that it too is

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[88] *Id.*

[89] *Id.*

[90] Pet. Mot. Leave Appeal Ct. Appeals at 11-12 & 16.

[91] Pet. Mot. Leave Appeal Ct. Appeals at16; App. 2-3.

[92] *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 53, 698 N.Y.S.2d 615, 619, 720 N.E.2d 892, 896 (1999) (citation omitted). With respect to the Appellate Division's authority to review mixed questions of law and fact, see, e.g., *Irmiyayeva v. Thompson*, 296 A.D.2d 439, 440, 745 N.Y.S.2d 199, 200 (2d Dep't 2002) (on appeal from an order granting or denying a motion for summary judgment, the Appellate Division has the inherent authority to search the record and grant summary judgment where appropriate); *Hazelhurst v. Brita Products Co.*, 295 A.D.2d 240, 241 744 N.Y.S.2d 31, 32 (1st Dep't 2002) (holding that the Appellate Division is vested with the same discretionary authority as the motion court to determine the propriety of class certification, even where the motion court has not abused its discretion as a matter of law). So too, the Appellate Division has the authority to review unpreserved issues in the interest of justice. *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 131,

not allowed to make on a summary judgment motion,[93] which is seen from the fact that it stated in its opinion that it rejected Petitioner's interpretation of the contract "upon an examination of the intent of the parties within the four corners of the agreement, *as well as the circumstances under which it was executed*" (emphasis added). The fact that the Appellate Division used its power to review is evident in that it also stated in its opinion that it had considered "the *allegation in the complaint* of breach by failure to pay the percentage of income from internet sales, *the circumstances* under which the agreement was executed and *the relationship of the parties...*" (emphasis added). In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that the issue of the Appellate Division not being able to settle questions of material fact in its review of summary judgment was brought up by Petitioner in his brief to the Appellate Division, where Petitioner in his argument that no issue of material fact could be settled by a court on summary judgment, cited authority from the Appellate Division recognizing that it did not have such power.[94] In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that as the above-stated questions of Petitioner's right to due process and trial by jury were brought up for appeal

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786 N.E.2d 28, 30 (2003), discussed in N.Y.S. LAW DIGEST, No. 520, at 3 (April 2003).

[93] *Sumner v. Extebank*, 58 N.Y.2d 1087, 1089, 462 N.Y.S.2d 810, 810-811, 449 N.E.2d 704, 35 U.C.C. Rep. Serv. 1362 (1983) (mem.). See also *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957).

[94] Br. Plaintiff-Appellant at 7-8. *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away).

before the Appellate Division, and, as the Appellate Division considered Petitioner's Constitutional questions and found them unavailing as to its decision on the case[95] – failing to cite adequate and independent New York State grounds for its determination,[96] such questions are preserved for appeal before this Honorable Court.[97]

(D) The State of New York Court of Appeals Opinion and Decision.

Petitioner took an Appeal, and simultaneously made a motion for leave to appeal to, the State of New York Court of Appeals ("Court of Appeals") on August 12, 2008.[98] On appeal, Petitioner presented the aforementioned issues regarding his constitutionally guaranteed rights to trial and to due process of law – particularly their being violated in the proceedings before the Supreme Court of the State of New York, New York County, and before the Appellate Division.[99] On August 26, 2008, the Court of Appeals made its own motion on the appeal to "consider its subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support the appeal taken as of right (CPLR 5601[b])."[100] The parties were requested to submit comments on the issue of subject matter jurisdiction,[101] and Petitioner submitted comments in which he alleged that: (1) both the

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[95] App. 2-3.
[96] *Id.*
[97] *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).
[98] App. 127.
[99] *Id.*
[100] App. 169.
[101] *Id.*

Supreme Court of the State of New York, New York County and the Appellate Division violated his Constitutional right to a trial by jury, when said Court's determined issues of fact;[102] (2) that said Courts violated an associated right to due process, as guaranteed by U.S.CONST. amend. XIV, when they violated his right to a trial by jury, as the Courts failed to follow established procedures of New York State law;[103] and (3) that said Courts violated Petitioner's right to due process, as guaranteed by U.S.CONST. amend. XIV, by granting summary judgment on a material issue that was raised for the first time in Respondent's reply papers – precluding reply – and by upholding a grant of summary judgment in which the court in question did not permit Petitioner meaningful opportunity to confront the evidence brought against his case.[104]

On October 28, 2008 the Court of Appeals dismissed Petitioner's appeal on "the ground that no substantial constitutional question [was] directly involved."[105] In that same Order, the Court of Appeals also denied Petitioner's motion for leave to appeal.[106]

Petitioner moved for reargument of the above determination, but the motion was denied by the Court of Appeals on January 22, 2009.[107]

In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that as the above-stated questions of Petitioner's right to due process and trial by jury were brought up for appeal before the Court of Appeals, and, as the Court of Appeals considered

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[102] App. 150.
[103] *Id.*
[104] *Id.*
[105] App. 1.
[106] *Id.*
[107] App. 33.

Petitioner's allegations, and found that no substantial Constitutional question was directly involved in the appeal[108] – failing to cite adequate and independent New York State grounds for its determination,[109] such questions are preserved for appeal before this Honorable Court.[110]

REASONS FOR ALLOWANCE OF THE WRIT

I. Petitioner's right to a trial by jury, which should be seen as referenced in the Seventh Amendment, and guaranteed by the Ninth, Tenth and Fourteenth Amendments, was violated when the State Courts in question determined issues of fact, traditionally associated with the province of the jury at common law.

In *Twining v. New Jersey*,[111] this Honorable Court considered:

> [Whether it were] possible that some of the *personal rights* safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law...If this is so, it is not because those rights are enumerated in the first eight Amendments, but *because* they are

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[108] App. 1.
[109] *Id.*
[110] *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).
[111] 211 U.S. 78 (1908).

> of such a nature that they are included in the conception o the due process of law.[112]

In what follows, Petitioner will argue that the safeguard of due process, enumerated in the Fourteenth Amendment, and referenced in the Seventh Amendment, applies to all cases– State or Federal – in which an issue traditionally tried at common law by a jury is litigated.

(A) The relationship between due process of law, the common law understanding of the jury's role in effectuating due process, and the Seventh Amendment.

As both Questions 1 & 2 of this Petition, *supra*,[113] deal with the issue of Petitioner's claim to a constitutionally protected right to trial in a summary judgment setting, addressing the issue of how the right to trial necessarily attaches to a triable issue of fact is itself a necessary step in determining the answers to said questions

Although the relationship between a triable issue of fact and a party's Seventh Amendment right to a trial by jury is something readily assumed in past New York State opinions,[114] the relationship itself is

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[112] *Id.* at 99 (emphasis added).

[113] Pet. i, *supra*.

[114] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away); *Closson v. Seaboard Sand & Gravel Corp.*, 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933) (holding that the right to a jury trial is a substantial Constitutional right not within the discretion of a judge); *Schenck v. Prudential Ins. Co. of America*, 167 Misc. 282, 283, 3 N.Y.S.2d 856, 858 (Sup. Ct. 1938). See also *Ives v. South Buffalo*

seen by New York courts as dating back to the common law understanding of the term "due process of law," as it was understood before the ratification of the United States Constitution;[115] for "due process of law" is seen as relating directly the proposition that no person shall be deprived of her rights to life, liberty or property, except by "the law of the land" or "lawful judgment of [her] peers" [116] (a New York State court analysis of the common law distinction between questions of fact and questions of law – referencing the distinct roles of the jury and judge at common law). In fact, the Seventh Amendment itself makes specific reference to the role of a jury (as it was understood at common law, and at the time of its adoption), when it uses the language "no fact tried by jury," and equates the term to the *preservation* of the common law "right of trial by jury."[117] It should also be noted here that the use of the term "any Court of the United States"[118] in the Seventh Amendment does not necessarily mean that right to a trial by jury of all triable issues is to exclusively receive protection in Federal Courts. The right itself, as described above, stems from the understanding of what due process entailed in its common law milieu, and as the Preamble, Ninth Amendment and Tenth Amendment make clear, there are rights vested in the people, which need not be enumerated to be

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Ry. Co., 201 N.Y. 271, 291, 94 N.E. 431, 438, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).

[115] *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct.,1907); *Matter of DES Market Share Litigation*, 79 N.Y.2d 299, 305, 591 N.E.2d 226, 229 (1992); *Fedoryszyn v. Weiss*, 62 Misc.2d 889, 891, 310 N.Y.S.2d 55, 58 (Sup. Ct. 1970).

[116] *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct. 1907).

[117] U.S.CONST. amend. VII.

[118] *Id.*

recognized as protected.[119] The fact that the Seventh Amendment specifically protects the people from infringement of a naturally existing right to trial by jury in the Federal courts, by enumerating said right, does not entail that the people's right to traditional common law protections may be violated freely in State courts without also violating Federally protected rights to due process of law. In fact, an argument can easily be made from the circumstances in which the Constitution was adopted – where many states approved the Constitution only on the guarantee that the new government would immediately create a bill of rights[120] – that it was a mistrust on the part of the people as to whether a Federal government would obviate understood practices and principles of due process (which the people were not willing to succeed),[121] and that such mistrust is the reason the Seventh Amendment gives particular attention to Federal courts. It seems doubtful that the ratifying legislatures were intent on creating a new distinctly Federal right, which, by accident, made specific reference to long-held common law protections. It is also doubtful, given the cultural milieu of the ratifying legislatures referenced previously, that they saw such common law rights as a right to trial by jury of factual questions, as something that any state government could take from its people.

At common law, the distinction between the roles of the judge and jury were more pronounced than

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[119] U.S.CONST. pmbl.; U.S.CONST. amend IX; U.S.CONST. amend. X.

[120] See John P. Kaminisi, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights*, 1787-1792, 33 SANTA CLARA L. REV. 887, 897-899 (1993) at 908, 912.

[121] *Hurtado v. People of State of California*, 110 U.S. 516, 528, 532, 536 (1884).

they are today, incorporating a distinction between law and equity.[122] Nonetheless, one common thread, running directly from the common law understanding of due process to the Seventh Amendment, was the understanding that the right to a trial of factual issues was an absolute right that could not be impaired by a court.[123]

Because the practice of summary judgment was not adopted by American courts until long after the ratification of the Seventh and Fourteenth Amendments,[124] and as the right to a trial, as mentioned above, was long seen as having a direct relationship to factual issues (taken in the common law context and milieu in which the Amendments were ratified), it is highly doubtful that the ratifying legislatures would have viewed the misapplication by state courts of a novel tool of procedure – obviating a litigant's access to a trial by jury – as mere harmless error, or something that constituted "due process of law." In such a light, it can be argued that no mere

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[122] Under the old equity rules it had been held that the *absolute right to a trial of the facts by a jury* could not be impaired, even by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid, in the federal courts, had to be sought in separate proceedings. *Scott v. Neely*, 140 U.S. 106, 109 (1891); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669 (1850); *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 470 (1874); *Killian v. Ebbinghaus*, 110 U.S. 568, 573 (1884); *Buzard v. Houston*, 119 U.S. 347, 351 (1886). See also *Ross v. Bernhard*, 396 U.S. 531, 539-540 (1970).

[123] *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857).

[124] See FED.R.CIV.P. 56, NOTES OF ADVISORY COMMITTEE ON RULES (Amended Mar. 19, 1948; July 1, 1963; Aug. 1, 1987); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 12-15 (3d ed., Aspen Publishers 2006).

establishment of a procedure – especially in cases where such procedure is misapplied – will sanction any court's infringement of the right to a trial by jury as it must have been understood by the ratifying legislatures. Support for such an argument can be found in *Ross v. Bernhard*,[125] where this Honorable Court held that the right to a jury trial *depends* on the nature of *the issue to be tried* rather than the procedural framework in which it is raised.[126]

As was noted in the argument above, the primary purpose of the Amendment was to *preserve* the historic line separating the province of the jury from that of the judge, without presumably preventing procedural improvement which did not transgress this line.[127] Elucidating this principle of law, this Honorable Court has made many rulings protecting the right to a trial in its association with the presence of a triable issue of fact.[128] Furthermore, due process has more recently been recognized by this Honorable Court to directly refer to a process of law that can show the sanction of settled usage both in England and in the United States.[129]

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[125] 396 U.S. 531 (1970).

[126] *Id.* at 539-540.

[127] *Id.*

[128] E.g., *Vicksburg & Meridian R.R. v. Putnam*, 118 U.S. 545, 553 (1886); *U.S. v. Philadelphia & Reading R.R.*, 123 U.S. 113, 114 (1887); *Carver v. Jackson*, 29 U.S. (4 Pet.) 1, 80 (1830); *Magniac v. Thompson*, 32 U.S. (7 Pet.) 348, 390 (1833); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 131 (1852); *Transportation Line v. Hope*, 95 U.S. 297, 302 (1877); *Games v. Dunn*, 39 U.S. (14 Pet.) 322, 327 (1840).

[129] *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).

(B) The right to a trial by jury of all triable issues, referenced in the Seventh Amendment, should also be seen as a guaranteed in actions before state courts by operation of the Fourteenth Amendment.

After noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for this Honorable Court in *Hurtado v. California*,[130] declared that:

> Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, *is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are *essential* to the preservation of public and private rights, *notwithstanding the representative character of our political institutions.* The enforcement of these limitations by judicial process is the device of self–governing communities to protect the rights of *individuals* and minorities, as well against the power of numbers, as against the violence of *public agents transcending the limits of lawful authority*, even when acting in the name and wielding the force of the government.[131]

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[130] 110 U.S. 516, 528, 532, 536 (1884).

[131] *Id* (emphasis added).

If "lawful authority" is to be understood in terms of due process of law and the rule of law as such has been understood even at common law, it is Petitioner's contention that the principles of due process embodied in the common law practice of separating for the jury all issue of fact is itself fundamental to the "enforcement of [liberty] by judicial process"[132] and that such has long been understood as an understood "device of self–governing communities,"[133] particularly where the people have, long before the adoption of the Constitution, understood a jury of their peers to occupy the governing role in settling issues of fact. Support for this argument, realizing a nexus between the concept of "trial" itself and due process, can me found in *U.S. v. Olano*,[134] where, according to other definitions, due process was taken to include the proposition that no error may be found harmless if said error deprives a litigant of the basic protections within which a trial can serve its function.[135]

II. Petitioner was denied due process of law, guaranteed by Section One of the Fourteenth Amendment, when the State Courts in question did not follow the

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[132] *Id.*

[133] *Id.* See also *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952) (holding that the phrase "due process of law" is the summarized constitutional guaranty of respect for those personal immunities that are so rooted in the traditions and conscience of the American people as to be ranked as fundamental or are implicit in the concept of ordered liberty).

[134] 507 U.S. 725, 735 (1993).

[135] *Id.*

State's own recognition of the right to trial in a civil case.

The courts of State of New York, as well as the New York State Constitution, recognize a right to trial of all issues of fact in a case for damages.[136] By failing to apply such protections in Petitioner's case,[137] the Courts in question denied Petitioner the regular application[138] of "the law of the land," and thereby violated his right to due process of law.[139]

III. The Courts in question violated Petitioners right to due process of law in upholding a grant of summary judgment, which was reached on issues presented for the first time in Respondent's reply papers, and in otherwise failing to allow Petitioner meaningful response.

Although the courts of the State of New York have readily held that it is a violation of a litigant's right to due process of law to have issues determined on motion which were placed before the court in the reply papers,[140] an argument can be made from

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[136] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away); *Closson v. Seaboard Sand & Gravel Corp.*, 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933); N.Y.CONST. art. I § 2.

[137] Pet. 2-22, *supra*.

[138] *Hurtado v. People of State of Cal.*, 110 U.S. 516, 528, 532, 536 (1884).

[139] *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 4 S. Ct. 663, 28 L.Ed. 569 (1884).

[140] *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992); *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959).

general principles of due process, Nationally understood, that the practice is violative of due process. As due process of law requires that a litigant be offered an opportunity to refute all evidence the merits of her case,[141] and as the raising of an issue in the reply papers disallows the litigant moved against the opportunity to respond,[142] a determination made by a court on such necessarily deprives said party of due process.

Furthermore, due process of law requires the impartiality of the tribunal,[143] and as the Motion Court in the present case had already determined the issue presented in the reply papers in favor of Respondent,[144] the hearing conducted on the motion, which was itself improper,[145] was not only impartial, which is seen from the great lengths the Motion Court went through to interpret inferences in favor of the moving party,[146] but also did not provide Petitioner meaningful response by its actions.[147]

CONCLUSION

Given the above-stated arguments and points of law, and considering the presence of the issues upon the record before this Honorable Court, it is

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[141] *Clifford v. U.S.*, 136 F.3d 144, 329 U.S.App.D.C. 1, 5-6 (D.C. Cir. 1998).

[142] *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 626, 630 N.Y.S.2d 1003, 1004-1005 (1st Dep't 1995).

[143] *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-105 (1976). See also *U.S. v. Olano*, 507 U.S. 725 (1993); *Smith v. Phillips*, 455 U.S. 209, 213 (1982).

[144] Pet. 2-16, *supra*.

[145] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).

[146] Pet. 2-16, *supra*.

[147] *Id.*

respectfully requested that this Honorable Court grant Petitioner's application for a writ of certiorari.

Respectfully submitted.

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